

DATE: March 4, 1999

SUBJECT: HEARING AND REHEARING EN BANC -- DISSOLUTION OF EN BANC*

1. Petitions for hearing en banc.

(a) The clerk shall send petitions for hearing en banc to the active judges of the court promptly upon filing, allowing seven working days for any judge to request a response.

(b) If no judge requests a response, the clerk will enter an order for the court denying the petition for hearing en banc.

(c) If a response is requested, the clerk will thereafter send the response (or a notice that none was filed) to the judges, allowing seven working days for any judge to initiate a poll in accordance with paragraph 5 of this procedure to determine whether the appeal or other matter should be heard en banc.

(d) If no poll is initiated, the clerk will enter an order for the court denying the petition for hearing en banc.

(e) If a poll is initiated and the petition for hearing en banc is granted,

* On December 1, 1998, amendments to the Federal Rules of Appellate Procedure became effective changing the spelling of “in banc” to “en banc” and substituting the term “petition” for “suggestion” in the phrase suggestion for hearing or rehearing en banc. Further, the Committee Note suggests that such a petition is denied or granted rather than declined or accepted. The spelling and phrases in this IOP are changed to reflect the spelling and phrases indicated by the Federal Rules of Appellate Procedure.

the judge who initiated the poll shall within seven working days transmit on a vote sheet to the judges who will sit en banc a draft order setting forth the questions proposed to be addressed by the court en banc. If a conference of judges and postconference polling has not already taken place, the chief judge shall convene a meeting of the court en banc at the earliest possible time for the purpose of ratifying the granting of the en banc petition unless a majority of judges indicated on their vote sheets that ratification is unnecessary. Upon ratification, or if ratification is unnecessary, the clerk will enter the order for the court granting the petition for hearing en banc and setting forth the schedule for additional briefing, if any, by the parties and by amici curiae, and for oral argument.

(f) If a poll is initiated and the petition for hearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court (i) advising that a poll was conducted, and (ii) denying the petition for hearing en banc, noting thereon any dissenting votes that may have been directed. If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an in banc action, then within three working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Three working days after such transmittal, the clerk will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition for hearing en banc, and (iii) attaching the opinion. If no opinion is transmitted within three working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the

court (i) advising that a poll was conducted, (ii) denying the petition for hearing en banc, and (iii) advising that an opinion will follow.

2. Petitions for rehearing en banc.

(a) Action on a petition for rehearing en banc that is part of a combined petition for panel rehearing and rehearing en banc will be deferred until the panel has acted on the petition for rehearing. A petition for rehearing en banc that is not combined with a petition for panel rehearing will be presumed to request relief that can be granted by the panel that heard the appeal; consequently, the clerk will send it promptly upon filing first to the panel in accordance with IOP # 12, paragraph 1(b), and action on the petition for rehearing en banc will be deferred until the panel has had the opportunity to grant the relief requested. If the panel either takes no action or grants less than all of the relief requested, the clerk shall send both the combined petition and any response considered by the panel to the active judges of the court and to any judge who was a member of the panel that heard the appeal or other matter but is not an active judge of the court, allowing seven working days for any of these judges to request a response to the petition for rehearing en banc.

(b) If no judge requests a response, the clerk will enter an order for the court denying the petition for rehearing en banc.

(c) When a response is requested and filed or the time for filing the requested response has passed without one having been filed, the clerk will send the response or a notice that none was filed to the judges, allowing seven working

days for any active or panel judge to initiate a poll in accordance with paragraph 5 of this procedure to determine whether the appeal or other matter should be reheard en banc.

(d) If no judge initiates a poll, the clerk will enter an order for the court denying the petition for rehearing en banc.

(e) If a poll is initiated and the petition for rehearing en banc is granted, the judge who initiated the poll shall within seven working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. If a conference of judges and postconference polling has not already taken place, the chief judge shall convene a meeting of the court en banc at the earliest possible time for the purpose of ratifying the granting of the en banc petition unless a majority of judges indicated on their vote sheets that ratification is unnecessary. Upon ratification or if ratification is unnecessary, the clerk will enter the order for the court granting the petition for rehearing en banc and setting forth the schedule for additional briefing by the parties and by amici curiae and for additional oral argument, if any.

(f) If a poll is initiated and the petition for rehearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court (i) advising that a poll was conducted, and (ii) denying the petition for rehearing en banc, noting thereon any dissenting votes that may have been directed. If a judge indicates on an in banc poll sheet that he

or she intends to file a separate opinion regarding the denial of an en banc action, then within three working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Three working days after such transmittal, the clerk will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition for rehearing en banc, and (iii) attaching the opinion. If no opinion is transmitted within three working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition for rehearing en banc, and (iii) advising that an opinion will follow.

3. Sua sponte petition for initial hearing en banc.

Initial hearing en banc following hearing by a panel of judges, but before the entry of judgment and opinion(s) by the panel, may be ordered sua sponte.

(a) During the seven-day circulation period to the court before precedential opinions are issued, any active judge may initiate a poll in accordance with paragraph 5 of this procedure. The request for a poll should ordinarily be accompanied by a memorandum of reasons supporting the petition or adopting the dissenting or concurring opinion of a judge on the panel.

(b) During the time for polling or awaiting a conference, the panel judgment and opinion(s) shall automatically be withheld for filing.

(c) If the sua sponte petition for initial hearing en banc is granted, the judge who initiated the poll shall within seven working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions

proposed to be addressed by the court en banc. If a conference of judges and postconference polling has not already taken place, the chief judge shall convene a meeting of the court en banc at the earliest possible time for the purpose of ratifying the granting of the en banc petition unless a majority of judges indicated on their vote sheets that ratification is unnecessary. Upon ratification or if ratification is unnecessary, the clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc. Notice shall be given that the court en banc shall consist of either (a) all circuit judges in regular active service or (b) if a senior circuit judge of the circuit participated in the decision of the panel that was polled and carried, of a special en banc panel, including all circuit judges in regular active service and the senior circuit judge of the circuit who was a member of the panel, convened under the special paneling authority of this court provided in 28 U.S.C. § 46(c). Additional briefing and oral argument will be ordered as appropriate.

4. Sua sponte petitions for rehearing en banc.

Rehearing en banc following issuance of a precedential opinion may be ordered sua sponte in the absence of a petition for rehearing en banc filed by a party.

(a) When no petition for rehearing en banc has been filed in an appeal that has been decided in a precedential opinion, within seven working days after the time allowed by the rules for filing a petition for panel rehearing any active judge may initiate a poll in accordance with paragraph 5 of this IOP. The request

for a poll should ordinarily be accompanied by a memorandum of reasons supporting the petition or adopting the dissenting or concurring opinion of a judge on the panel.

(b) If the sua sponte petition for rehearing en banc is granted, the judge who initiated the poll shall within seven working days transmit on a vote sheet to the judges who will sit en banc an order setting forth the questions proposed to be addressed by the court en banc. If a conference of judges and postconference polling has not already taken place, the chief judge shall convene a meeting of the court en banc on the 8th working day following circulation of the vote sheet for the purpose of ratifying the granting of the en banc petition unless a majority of judges indicated on their vote sheets that ratification is unnecessary. Upon ratification or if ratification is unnecessary, the clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc and enter an order for the court vacating the judgment and withdrawing the opinion(s) filed by the panel that heard the appeal. Additional briefing and oral argument will be ordered as appropriate.

(c) If a sua sponte petition for rehearing en banc is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court advising that a poll of judges in regular active service whether to rehear the appeal was conducted at the request of an active judge, but failed of a majority, noting thereon any dissenting votes that may have been

directed. If a judge indicates on an en banc poll sheet that he or she intends to file a separate opinion regarding the denial of an en banc action, then within three working days after the poll deadline ends, the judge will transmit his or her opinion to the other judges. Three working days after such transmittal, the clerk will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition for rehearing en banc, and (iii) attaching the opinion. If no opinion is transmitted within three working days after the poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition for rehearing en banc, and (iii) advising that an opinion will follow.

5. Poll.

(a) A poll is initiated by a judge or a panel of judges requesting the chief judge to poll the active judges on a petition for hearing or rehearing en banc of a party or sua sponte. When a poll is requested, the chief judge shall distribute an en banc ballot containing these choices:

- (i) To deny en banc review.
- (ii) To hear or rehear the appeal en banc.
- (iii) To defer voting pending a conference of the judges.

For sua sponte suggestions, the chief judge will also distribute any memoranda accompanying a judge's request for a poll. Copies of the certificates of interest filed in the matter shall accompany the distribution if they have not previously been circulated with the en banc suggestion of a party.

If the chief judge fails to distribute the ballots within three working days following the request for a poll, the requesting judge may conduct the poll.

(b) The judges will strictly adhere to the period for polling. The polling shall end at 5:30 p.m. on the 7th working day following the date of distribution of the ballot, and ballots received in the office of the chief judge thereafter shall not be counted.

(c) The poll results shall be tallied and announced. When the time for balloting closes, the chief judge shall promptly tally the ballots and notify the court of the results of the poll. If a majority either votes against en banc review or fails to vote, the poll fails and the petition, if any, is denied. If a majority votes to hear or rehear the appeal en banc, the poll passes and the petition, if any, is granted. If a majority votes to defer voting pending a conference of judges, the chief judge shall schedule a conference. If less than a majority vote to hear or rehear the appeal en banc or to defer voting pending a conference, but together those votes constitute a majority, the chief judge shall schedule a conference. A judge voting for or against en banc hearing or rehearing may indicate that the vote shall also be counted in the event a postconference poll is conducted.

(d) A postconference poll will be conducted. If a conference is called, promptly following the conference the chief judge shall distribute a ballot containing these choices:

- (i) To deny en banc review.
- (ii) To hear or rehear the appeal en banc.

If the chief judge fails to distribute the ballots within two working days following the conference, the requesting judge may conduct the poll.

(e) The judges will strictly adhere to the period for postconference polling. The postconference polling shall end at 5:30 p.m. on the second working day following the date of distribution of the ballot, and ballots received in the office of the chief judge thereafter shall not be counted.

(f) The postconference poll results shall be tallied and announced. When the time for balloting closes, the chief judge shall promptly tally the ballots (including those votes to be carried over from the preconference poll) and notify the court of the results of the post-conference poll. If a majority votes to hear or rehear the appeal en banc, the postconference poll passes and the petition, if any, is granted; otherwise, the poll fails and the petition, if any, is denied.

(g) Multiple polls will not be taken. The initiation of a poll by a judge or judges terminates the period for requesting a poll. Thereafter, other judges may circulate memoranda supporting or opposing en banc hearing or rehearing during the balloting period.

(h) If a postconference poll is conducted and the petition is denied, and there are no dissenting votes or a judge votes to dissent without opinion, the clerk will enter an order for the court (i) advising that a poll was conducted, and (ii) denying the petition, noting thereon any dissenting votes that may have been directed. If a judge indicates on a postconference ballot that he or she intends to file a separate opinion regarding the denial of an en banc action, then within three

working days after the postconference poll deadline ends, the judge will transmit his or her opinion to the other judges. Three working days after such transmittal, the clerk will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition, and (iii) attaching the opinion. If no opinion is transmitted within three working days after the postconference poll deadline ends, then the clerk, unless otherwise ordered by the chief judge, will enter an order for the court (i) advising that a poll was conducted, (ii) denying the petition, and (iii) advising that an opinion will follow.

6. Extension of three working days upon request.

A judge entitled to request or to participate in an en banc or dissolution poll may extend any time set forth in this procedure by three working days upon sending a notice to the chief judge received before 5:30 p.m. on the final day for action, with copies to other participating judges. The notice extends that time for all judges. Only one such extension is permitted for any period of action.

7. Petitions to hear or rehear motions or other non-merits matters en banc.

A petition that a motion or other matter not involving the merits of the case should be determined by the court en banc will not be circulated to the judges in regular active service until the underlying motion or matter has been acted upon by a motions or merits panel, as appropriate, but if the panel grants the entire relief requested, the petition shall be deemed moot.

8. Sua sponte petitions for dissolution of en banc status.

(a) Dissolution of en banc status may be ordered any time before filing or entry of a judgment and opinion(s) by the en banc court or, in the case of a remand by the United States Supreme Court to the en banc court, any time before filing or entry of a judgment and opinion(s) after remand.

(b) Any active judge who voted to grant a petition for hearing or rehearing en banc may initiate a dissolution poll by transmitting a dissolution of en banc poll request to the chief judge. The request for a dissolution poll should ordinarily be accompanied by a memorandum of reasons supporting the petition for dissolution of en banc status.

(c) After a judge has initiated a poll, the en banc judgment and opinion(s) will automatically be withheld for filing or entry until the petition for dissolution of en banc status is granted or denied.

(d) When a poll is requested, the chief judge will distribute to all of the judges in regular active service a dissolution poll ballot containing these choices:

- (i) to retain en banc status;
- (ii) to dissolve the en banc court and refer the case to a panel; or
- (iii) to defer voting pending a conference of judges.

If the chief judge fails to distribute the ballots within three working days following the request for a poll, the requesting judge may conduct the poll. Any

judge may circulate memoranda supporting or opposing dissolution during the balloting period.

(e) The polling period ends at 5:30 p.m. on the seventh working day following the date of distribution of the ballot, and ballots received in the office of the chief judge after that time will not be counted.

(f) When the time for balloting closes, the chief judge will promptly tally the ballots and notify the court of the results of the poll. If a majority either votes against dissolution or fails to vote, the poll fails and the petition is denied. If a majority votes to dissolve, the poll passes and the petition for dissolution of en banc status is granted. If a majority votes to defer voting pending a conference of judges, the chief judge will promptly schedule a conference. If less than a majority vote to dissolve and less than a majority vote to defer voting pending a conference, but the votes to dissolve and to defer voting together constitute a majority of votes, the chief judge will schedule a conference.

(g) If a conference is called, promptly following the conference the chief judge will conduct a postconference poll. The chief judge will distribute a ballot containing these choices:

- (i) to retain en banc status; or
- (ii) to dissolve the en banc court and to refer the case to a panel.

If the chief judge fails to distribute the ballots within two working days following the conference, the requesting judge may request the poll.

(h) The postconference polling period ends at 5:30 p.m. on the second working day following the date of distribution of the ballot, and ballots received in the office of the chief judge after that time will not be counted.

(i) When the time for balloting closes, the chief judge will promptly tally the ballots and notify the court of the results of the postconference poll. If a majority votes to dissolve the en banc court, the postconference poll passes and the petition for dissolution of en banc status is granted; otherwise the poll fails and the petition is denied.

(j) Multiple polls may not be requested or taken. The initiation of a dissolution poll by a judge terminates the period for requesting a poll.

(k) If the sua sponte petition for dissolution of en banc status is granted, the chief judge will distribute to all of the judges in regular active service a vote sheet containing these choices:

(i) to refer the case to the panel that was initially assigned to the case, if any, (or to the remaining two judges of that panel and one judge to be newly selected); or

(ii) to refer the case to a three-judge panel to be newly selected.

The voting period will end at 5:30 p.m. on the third working day following the distribution of the vote sheet, and votes received in the office of the chief judge after that time will not be counted. A majority of votes received will determine the issue.

(l) After these procedures are completed and if the en banc court has determined to dissolve its en banc status, the chief judge will direct the clerk to issue an order giving notice thereof.

9. Recusal.

A judge wishing to recuse shall promptly upon receiving a petition for hearing or rehearing en banc or upon receiving a ballot for a sua sponte en banc poll or a dissolution poll notify the court of his or her recusal.